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No. 93

In the Supreme Court of the United States

October Term, 1961

SIDNEY BAUMGARTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 914

BERNARD BAUMGARTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-16; R. 46a-49a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1962 (R. 50a). On April 13, 1962, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including April 30, 1962. The petition was filed on April 28,

1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an Argentine law school graduate was properly permitted to testify, as an expert witness, that the customs laws of Argentina provided for an import duty on nylon hosiery.

2. Whether petitioner could be convicted under the mail fraud statute for using the mails in a scheme to defraud the government of Argentina of import duties.

3. Whether the marking of mailed packages containing hosiery and lace as "books" constituted a false statement under 18 U.S.C. 1001.

STATUTES AND REGULATIONS INVOLVED

18 U.S.C. 1341 provides:

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail mat-

ter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact; or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. 1723 provides:

Avoidance of postage by using lower class matter

Matter of the second, third, or fourth class containing any writing or printing in addition to the original matter, other than as authorized by law, shall not be admitted to the mails, nor delivered, except upon payment of postage for matter of the first class, deducting therefrom any amount which may have been prepaid by stamps affixed, unless by direction of the Postmaster General such postage shall be remitted.

Whoever knowingly conceals or encloses any matter of a higher class in that of a lower class,

and deposits the same for conveyance by mail, at a less rate than would be charged for such higher class matter, shall be fined not more than $100.

39 C.F.R. (1961 Supp.) 168.5 provided in part:

Argentina

* * * * *

Parcel Post

Surface parcel rates, including surcharges. $0.48 first pound; $0.25 each additional pound.

* * * * *

Prohibitions. * * *

* * * * *

New ready-made clothing and fabrics of all kinds, except articles of small value sent as gifts (see 'Observations').

* * * * *

39 C.F.R. 104.8 provides in part:

Books—(a) *Surface rate.* Surface rate for books, as defined in § 25.2(a)(4)(i) of this chapter is 8 cents each pound or fraction when addressed to the following countries:

Argentina.

* * * * *

STATEMENT

Count 1 of an indictment (R. 2a-3a) returned in the United States District Court for the Southern District of New York charged petitioner with using the mails in a scheme to defraud the Argentine government of import duties by placing in the mails certain packages labeled "books", which in fact con-

tained nylon hosiery and lace. Count 2 (R. 4a) charged petitioner with making a false statement as to the contents of these packages to the Post Office Department, in violation of 18 U.S.C. 1001 (*supra*, p. 3). The jury found petitioner guilty on both counts, and the court imposed consecutive sentences on each count of imprisonment for three months and a $500 fine (R. 31a). On appeal the conviction was affirmed (R. 50a).

1. The evidence showed that in January and February 1960, petitioner entered into a plan with unknown persons to smuggle merchandise from the United States into Argentina by mailing it in falsely labeled packages (R. 41a-42a). In the execution of this scheme, during June 1960, petitioner on three occasions purchased large quantities of hosiery (R. 34a). On June 16, 1960, petitioner and Kleiner, an off-duty postal employee, mailed at a New York post office about 150 packages, addressed to Argentina, labeled "books" (R. 37a, 45a).

On June 30, 1960 (the date of the offenses charged in Counts 1 and 2), with Kleiner again assisting him, petitioner mailed to an address in Argentina 113 packages labeled "books" which were accepted by the window clerk for mailing and stamped at the book rate of $1.50 per package (R. 35a-37a). On July 5 and 6, 1960, postal employees opened these packages and discovered that 107 of them contained over 38,000 pairs of nylon stockings and that 6 of them contained about 11,000 yards of lace (R. 38a-39a). Concealed in each package was an envelope containing

roughly $3.60 or $3.65 in uncancelled postage stamps (R. 39a).

When questioned by postal inspectors at his home on July 8, 1960, petitioner admitted that he had endorsed "books" on the 113 packages he mailed with his return address on June 30, 1960 " * * * to avoid the payment of customs duties in Argentina" (R. 40a-41a). Petitioner stated that he purchased the stockings and lace with $16,000 he received in a hotel lobby from an unidentified man sent by one Feivel from Argentina (R. 42a). Under the arrangement with Feivel petitioner was to receive $250 for each shipment (R. 41a). Petitioner stated he paid $2.50 per parcel, or approximately $280 for the 113 packages mailed on June 30, 1960, to the postal employee, Kleiner, who was to see that the parcels got on a particular boat to Argentina (R. 41a).

2. The court took judicial notice of the United States postal regulations. The regulation fixing parcel post rates for merchandise shipments to Argentina (39 C.F.R. 168.5) contains a prohibition against the shipment of new nylon hosiery (*supra*, p. 4).

One Bullrich, a lawyer and citizen of Argentina, was permitted to testify as an expert witness for the government over defense objection (R. 10a). He had received a law degree from the University of Buenos Aires; had practiced for about six months prior to graduation with a law firm, for which he did research and general legal work; and as part of his education, had learned how to look up the Argentina statutes (R. 10a, 13a). Although he had finished

his studies, he had not applied for admission to the Argentina bar (R. 11a).

Bullrich identified two editions (May 9, 1959 and January 13, 1960) of the daily "Official Bulletin of the Argentina Government" as documents having a binding effect upon everyone after their publication (R. 13a-18a, 20a; Gov. Ex. 9-13). He identified translations of their provisions as establishing an import duty on nylon hosiery of 150% on January 13, 1960 (R. 17a, 19a). This witness testified that the duty of 150% on nylon hosiery had not been amended at any time between January 13, 1960 and August 1, 1960. He stated as the basis for this statement that he had checked with the government officials in the Argentine embassy in Washington responsible for these matters (R. 19a-20a). The witness explained that this was the procedure an attorney in Argentina would use, since there was no index to the daily bulletin and it would have been "quite impractical to have to read every daily issue of the bulletin * * * during six months to establish if the law or the statute has changed" (R. 20a, 21a, 22a).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 8-10) Bullrich was properly permitted to testify as to the existence of an Argentine import duty on nylon hosiery. His graduation from law school, his six months' practice with a law firm, and his knowledge as to how to research Argentine statutes afforded sufficient factual basis for accepting him

as a qualified expert witness on the matter involved, which was a simple question of the existence of an Argentine duty on nylon hosiery. Cf. *United States* v. *Alker*, 260 F. 2d 135, 155, 156 (C.A. 3), certiorari denied, 359 U.S. 906; *DeFreese* v. *United States*, 270 F. 2d 737, 740 (C.A. 5), certiorari denied, 362 U.S. 944; *Formhals* v. *United States*, 278 F. 2d 43, 47 (C.A. 9); II Wigmore on *Evidence* (3rd Ed.) § 561(2).

Bullrich's explanation of his conclusion that the import duty on nylons was in effect on June 30, 1960, was entirely reasonable. He did exactly what a more experienced attorney would have done in ascertaining from the proper officials at the Argentine embassy that the import duty had not been amended, rather than pursuing the unnecessary time-consuming task of reading each daily official bulletin for the period involved.[1] Petitioner himself recognized existence of the import duty since he admitted to the postal inspectors that he sent the falsely labeled packages "to avoid the payment of customs duties in Argentina" (R. 41a). Indeed, since success of the scheme to defraud is not an element of the offense under 18 U.S.C. 1341, petitioner, having admittedly used the

[1] Since the prosecution proved the existence of an Argentine import duty on January 13, 1960, a presumption arose that this foreign law continued and remained in force on June 30, 1960. See *In the Matter of Huss*, 126 N.Y. 537, 513; *Zarate* v. *Villareal*, 155 S.W. 328, 337 (Tex. Civ. App.); IX Wigmore on *Evidence* (3rd ed.) § 2530. Petitioner offered no evidence to rebut this presumption, although his counsel was informed prior to the trial of the form the government's proof would take (R. 8a).

United States mails with intent to defraud, was guilty whether or not Argentina did in fact impose import duties.

2. There is no merit to petitioner's contention that there could be no mail fraud violation of 18 U.S.C. 1341 (*supra*, pp. 2-3) since the fraud was directed against a foreign government (Pet. 8). The statute in broad language refers to "any scheme or artifice to defraud," and does not make material the identity of the victim or carry any implication that the victim may not be a foreign government such as Argentina here. The gravamen of the offense was petitioner's use of the United States mail in an attempt to execute his scheme to defraud Argentina of import duties. The court was enforcing the federal statute in vindication of the sanctity of the United States mail; it was not, in an illegal manner beyond its jurisdiction, executing foreign law to assure collection of import duties for Argentina.

In *Parr* v. *United States*, 363 U.S. 370, 389, in speaking of the mail fraud statute, this Court observed:

> The fact that a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute, for Congress "may forbid any . . . [mailings] . . . in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not." *Badders* v. *United States*, 240 U.S. 391, 393.

By a parity of reasoning, the fact that petitioner's acts contravened Argentine law did not preclude the applicability of the mail fraud statute. See also

United States v. *Sylvanus*, 192 F. 2d 96, 100 (C.A. 7), certiorari denied, 342 U.S. 943.

3. Petitioner suggests that on count 2 he should have been prosecuted under 18 U.S.C. 1723 (*supra*, pp. 3-4) because of its more lenient sentence, instead of under 18 U.S.C. 1001. Petitioner's acts do not fall within the language of 18 U.S.C. 1723 since he did not enclose "matter of a higher class in that of a lower class", but wrongfully labelled a single class. More significantly, petitioner's acts went far beyond the limited coverage of 18 U.S.C. 1723. His willfully false statement as to the contents of the package not only resulted in a lower postal rate, but resulted in the mailing of a package which under the regulations was not mailable at all. The government therefore properly proceeded under 18 U.S.C. 1001. Cf. *United States* v. *Gilliland*, 312 U.S. 86, 95-96; *United States* v. *Beacon Brass Co.*, 344 U.S. 43.

Nor were overlapping penalties imposed. The elements of the crime of making a false statement to the United States are wholly different from the elements of the crime of using the mails in a scheme to defraud. Hence the separate sentences on the two counts were justified. Cf. *Gore* v. *United States*, 357 U.S. 386; *Pereira* v. *United States*, 347 U.S. 1, 9.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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